TELEKOM MALAYSIA BHD

v.

RAMLI AKIM

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
IAN HC CHIN J
[APPLICATION FOR JUDICIAL REVIEW NO: K25-23-2004]
24 JUNE 2005

ADMINISTRATIVE LAW: *Judicial review - Industrial Court - Decision of - Monetary compensation - Backwages - Whether Industrial Court erred in law when it awarded backwages of 53 months - Industrial Relations Act 1967, s. 30 - Whether there is a pre-set limit as to the number of months of backwages awarded - Relevant factors to be taken into consideration in deciding amount of backwages - Loss of future earnings - Whether respondent entitled to future loss of earnings - R Rama Chandran v. Industrial Court of Malaysia & Anor - Koperasi Serbaguna Sanya Bhd (Sabah) v. Dr James Alfred (Sabah) & Anor*

LABOUR LAW: *Industrial Court - Decision - Monetary compensation - Backwages - Whether Industrial Court erred in law when it awarded backwages of 53 months - Industrial Relations Act 1967, s. 30 - Whether there is a pre-set limit as to the number of months of backwages awarded - Relevant factors to be taken into consideration in deciding amount of backwages - Loss of future earnings - Whether respondent entitled to future loss of earnings - R Rama Chandran v. Industrial Court of Malaysia & Anor - Koperasi Serbaguna Sanya Bhd, Sabah v. Dr James Alfred, Sabah & Anor*

The applicant herein was dissatisfied with the decision of the Industrial Court in handing down an award in favour of the respondent. In this action to have the said award quashed, the applicant argued that (1) the Industrial Court had erred in law when it awarded backwages of 53 months instead of 24 months and thus ignored the Industrial Court Practice Note No. 1 of 1987; (2) that the delay in conclusion in handing down of the award was not solely caused by the applicant; (3) that the applicant should not be made responsible for the respondent's failure in venturing into unsuccessful business after his dismissal and it should not be a factor to take into consideration in deciding amount of backwages and (4) that the Industrial Court was wrong to grant loss of future earnings.

Held (dismissing application for judicial review):

[1] Only the Industrial Court, High Courts and the appellate courts have the jurisdiction to interpret the law as to the amount or the number of month of backwages that can be awarded. They can make their decision upon an interpretation of the relevant law and not be directed to do so as the said practice note attempts to do so. The law that calls for interpretation is s. 30 of the Industrial Relations Act 1967 and there is no pre-set limit there as to the number of months of backwages that can be awarded. The Federal Court in *R Rama Chandran v. Industrial Court of Malaysia & Anor* had allowed 88 months of backwages. Therefore it was not *per se* wrong in law that an award of backwages exceeded the 24 months mentioned in the said practice note. (p 490 g-h)

[2] If it was through no fault of the applicant that the hearing was delayed, it was even more so in the case of the respondent. The respondent should not be made to suffer for the delay. It was the applicant who had started it all, thus the applicant should be made to shoulder the delay as being consequent of the wrongful dismissal which the applicant was guilty of. Employers should ponder very carefully before they embark on the action of dismissing employees and they must take into account that the hearing can be protracted that may result in a higher amount of backwages. (p 491 e-f)

[3] The matter of the respondent's unsuccessful venture into business was not necessarily irrelevant because if the respondent had made money from it, then the profit must be brought to account when deciding on the amount of backwages just as, as was decided in *Koperasi Serbaguna Sanya Bhd (Sabah) v. Dr James Alfred (Sabah) & Anor* income obtained from other employment had to be taken into account. Therefore when the respondent had failed in his attempt at a business venture it did not mean that he was not at that time out of employment as he still was. That period when he was out of employment, and not the failure of the business venture, was actually the factor that was taken into account in deciding the amount of the backwages. Since the respondent was not expected to obtain a similar employment it would mean that he would be out of employment and he was rightly compensated by way of backwages. (p 492 c-d, g)

[4] The loss of future earnings covered an entirely different period for which the respondent could not for various valid reasons be expected to secure similar employment nor reasonably be expected to return to work for the applicant. As for such award being permissible under the law, the authority would be the Federal Court case of *R Rama Chandran Sdn Bhd v.*

Industrial Court of Malaysia & Anor where such future loss of earnings was awarded. The respondent here would have been entitled to work till he was 55 years old if not for his wrongful dismissal on 1 June 1997. Therefore, he would have been entitled to earn the wages from that period till his compulsory retirement age of 55 years. (p 494 c-f)

[The award of the Industrial Court was correct.]

Case(s) referred to:

Chan Hock Liong v. Associated Motor Industries (M) Sdn Bhd [1998] 3 CLJ Supp 105 HC ***(refd)***

Edaran Otomobil Nasional v. Neoh Hock Lye [1990] 1 ILR 163 ***(refd)***

Koperasi Serbaguna Sanya Bhd, Sabah v. Dr James Alfred (Sabah) & Anor [2000] 3 CLJ 758 CA ***(foll)***

R Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(foll)***

Syarikat Kenderaan Melayu Kelantan v. Transport Workers Union [1992] 1 ILR 101 ***(refd)***

Vadiveloo Munusamy v. General Tyre Retreaders sdn Bhd [1999] 7 CLJ 596 HC ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, s. 30

For the applicant - Christopher Chong; M/s Lind Willie Wong & Chin
For the respondent - Michael Tan; M/s Michael Denis Tan & Co

Reporteb by Suhainah Wahiduddin

JUDGMENT

Ian HC Chin J:

Introduction

The applicant, Telekom Malaysia Berhad, wanted the award of the Industrial Court dated 28 September 2004 and given in favour of the respondent, Ramli bin Akim, quashed. The dissatisfaction was directed at the various monetary compensation which was awarded in the following terms (to quote from the award):

> In the light of the abovementioned principles as embodied in the Federal Court cases of Rama Chandran and Dr James Alfred and after taking into account all relevant matters pertaining to the instant case, this Court makes the following order, which are in the Court's view a reasonable monetary compensation:

(i) (a) Backwages from the date of dismissal (1.6.1997) to the last date of hearing on 21.11.01:

RM3,042.00 x 53 months	=	RM161,226.00

(b) loss of future earnings:

Claimant was born on 13th June 1954 and his present age is therefore 50 years 3 months. He would reach 55 years of age on 13th June 2009, ie, almost another 57 months from the date of this Award. For loss of future earnings, I would award:

(RM3,042.00 x 57 months)	=	RM173,394.00

(ii) Compensation *in lieu* of reinstatement (One month salary for every completed year of service ie, from (1972 till 1997)

(RM3,042.00 x 25 years)	=	RM76,050.00
Total amount	=	RM410,670.00
Less VRP taken	=	RM114,000.00
Balance due to the Claimant	=	RM296,670.00

Limitation Of Back Wages

The applicant argued that the Industrial Court erred in law when it awarded back wages of 53 months instead of 24 months and thus had ignored the Industrial Court Practice Note No. 1 of 1987 which relevant part says that: "Back pay in full from the date of dismissal to the date of conclusion of hearing, subject to a maximum of 24 months." It was argued that the High Court had followed that practice note in several cases, namely, *Edaran Otomobil Nasional v. Neoh Hock Lye* [1990] 1 ILR 163; *Syarikat Kenderaan Melayu Kelantan v. Transport Workers Union* [1992] 1 ILR 101-105; *Chan Hock Liong v. Associated Motor Industries (M) Sdn Bhd* [1998] 3 CLJ Supp 105; *Vadiveloo Munusamy v. General Tyre Retreaders Sdn Bhd* [1999] 7 CLJ 596, to limit the back wages to a maximum of 24 months. Only the Industrial Court or the High Courts and the appellate courts have the jurisdiction to interpret the law as to the amount or the number of month of back wages that can be awarded and they can make their decision upon an interpretation of the relevant law and not be directed to do so as the said practice note attempts to do so. The law that calls for interpretation is s. 30 of the Industrial Relations Act 1967 and there is no pre-set limit there as to the number of months of back wages that can be awarded. In fact the Federal Court in *R Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 had allowed 88 months of back wages. Therefore it is not *per se* wrong in law that an award of back wages exceeded the 24 months mentioned in the said practice note.

It was then argued by the applicant that the Industrial Court had erred in failing to take into account:

a. that the delay in conclusion in handing down of the Award was not solely caused by the applicant;

b. the delay in the hearing of the matter was primarily due to the delay of the Minister of Human Resources in referring the matter to the Industrial Court wherein it was only referred to the court on 30 September 1999, which was more than two years after the alleged dismissal of the respondent on 1 June 1997; and

For the purpose of this issue of delay, the applicant had relied specifically on the following passage in *Syarikat Kenderaan Melayu Kelantan v. Transport Workers Union* [1992] 1 ILR 101 at 105 & 106, Steve Shim (as he then was), where it was said:

> Hearing proper commenced on 27 January 1992. Thus between the date of their dismissals and date of hearing, there is a lapse of over 5 years. This delay is of course no fault of the company. In any event, in accordance with practice, we shall adopt a multiplier of 24 months.

If it was through no fault of the applicant that the hearing was delayed, it was even more so in the case of the respondent. Given this situation, why should the respondent be made to suffer for the delay? So, it is only right to consider who started it all. It was the applicant and the applicant should be made to shoulder the delay as being a consequent of the wrongful dismissal which the applicant was guilty of. So employers should ponder very carefully before they embark on the action of dismissing employees and they must take into account that the hearing can be protracted that may result in a higher amount of back wages. The Industrial Court was also said to be wrong in other aspects which the applicant through their advocate said so in the following words:

> 20. In addition, the Industrial Court, in granting full backwages exceeding 24 months, had also erred in law in considering the following irrelevant factors at page 33 of its Award:
>
> a. that the Respondent's venture into business after his alleged dismissal was not successful;
>
> b. that the Respondent had been an employee all his working life and to make a switch at such a late stage of his working life as a businessman would not be beneficial to him; and

c. that the Respondent had been out of touch with his previous position for such a long time and would not likely be employed in a similar position elsewhere.

21. Such factors and considerations are irrelevant to the issue of backwages. Why should the Applicant be made responsible for the Respondent's failure in business? The Respondent's conduct and decision in venturing into his eventually unsuccessful business was something not within the Applicant. This was precisely what the Industrial Court erroneously took into account.

It must be pointed out that the matter of the respondent's unsuccessful venture into business was not necessarily irrelevant because if the respondent had made money from it then the profit must be brought to account when deciding on the amount of the back wages just as, as was decided in *Koperasi Serbaguna Sanya Bhd, Sabah v. Dr James Alfred, Sabah & Anor* [2000] 3 CLJ 758, income obtained from other employment had to be taken into account. Therefore, when the respondent failed in his attempt at a business venture it did not mean that he was not at that time out of employment as he still was. That period when he was out of employment, and not the failure of the business venture, was actually the factor that was taken into account in deciding the amount of the back wages. As for the matters stated in b and c, it could not be irrelevant as the Industrial Court was following what was laid down in *R Rama Chandran v. The Industrial Courts of Malaysia* [1997] 1 CLJ 147 where it was held:

(9) (Per Yusoff Chin Chief Justice) In the context of the facts of the case before the Court, it would not be in the interest of either the Employer or the Employee if the Court were to order reinstatement with full backwages. The Employee was now 51 years old, had been out of employment for seven years and had lost touch with his work. It was doubtful if he could fit in the society where he used to work and where he was not wanted. Under the circumstances, sending him back to the Employer would cause him more mental distress and suffering

Though what was said there was in relation to going back to his former employment, it is no less applicable in relation to getting a similar job with a different employer since in both instances, similar "lost touch with his work" would pertain. Since the respondent was not expected to obtain a similar employment it would mean that he would be out of employment and he was rightly compensated by way of back wages. It was then argued that the Industrial Court was wrong to grant loss of future earnings.

Loss Of Future Earnings

This is what the applicant's counsel said:

> **B. The Industrial Court erred in law in granting future loss of earnings to the Respondent**
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> 1. At page 42 of its Award, the Industrial Court ruled as follows:
>
> (b) loss of future earnings
>
> Claimant was born on 13th June 1954 and his present age is therefore 50 years 3 months. He would reach 55 years of age on 13th June 2009 i.e. almost another 57 months from date of this Award. For loss of future earnings, I would award:
>
> (RM3,042.00 x 57 months) = RM173,394.00
>
> 2. It is submitted that this part of award on future loss of earnings is perverse and is in breach of section 30(5) of the Industrial Relations Act 1967.
>
> 3. Section 30(5) of the Act mandates the Industrial Court "to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form."
>
> 4. As the Industrial Court must act according to equity, principles of equity are relevant. The maxim "equity leans against double portions", means that equity operates to preclude the grant of a remedy which goes beyond what is required to remedy grievances of an aggrieved party. The aim of the above maxim is consistent with the established principle of unjust enrichment. The maxim is commonly applied in cases that deal with the satisfaction of portion debts by legacies.

In order to appreciate that argument, it is best I reproduce the total award that was handed down which is (to quote):

> (i) (a) Backwages from the date of dismissal (1.6.1997) to the last date of hearing on 21.11.01:
>
> RM3,042.00 x 53 months = RM161,226.00
>
> (b) loss of future earnings:
>
> Claimant was born on 13th June 1954 and his present age is therefore 50 years 3 months. He would reach 55 years of age on 13th June 2009, ie, almost another 57 months from the date of this Award. For loss of future earnings, I would award:
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> (RM3,042.00 x 57 months) = RM173,394.00

(ii) Compensation in lieu of reinstatement (One month salary for every completed year of service ie, from (1972 till 1997)

(RM3,042.00 x 25 years)	=	RM76,050.00
Total amount	=	RM410,670.00
Less VRP taken	=	RM114,000.00
Balance due to the Claimant	=	RM296,670.00

So, back wages covered the period from 1 June 1997 (date of dismissal) to 21 November 2001 (the date of hearing) by which latter date the respondent was of the age of 50 years and 3 months. What then of the period from 22 November 2001 till the respondent reached the compulsory retirement age of 55 years, some 57 months? For this period the Industrial Court awarded the said loss of future earnings. It was not elaborated how this award can be regarded as doubling the award of what the respondent would be entitled to. The loss of future earnings covers an entirely different period for which the respondent could not for various valid reasons be expected to secure similar employment nor reasonably be expected to return to work for the applicant. As for such award being permissible under the law, the authority would be the Federal Court case of *R. Rama Chandran Sdn. Bhd. v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 where such future loss of earnings was awarded. Simply put and based on the authorities I have referred to, the respondent would have been entitled to work till he was 55 years old if not for his wrongful dismissal on 1 June 1997 and therefore would have been entitled to earn the wages from that period till his compulsory retirement age of 55 years. Therefore, it matters not what label you attach to the award of the wages for that period but it is lawful to award the same from the date of the dismissal to the date of his compulsory retirement age. Then deductions ought to be made for various factors like, for example, an employee having found alternative employment or having been gainfully engaged in business. None of those factors that warrant a deduction were present in this case.

Conclusion

The award of the Industrial Court was therefore a correct one. The application for judicial review is dismissed with costs to the respondent.